Item Industrial Engineering Sdn Bhd & Ors v Bank Utama (M) Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1699 OF 2009
ZALEHA ZAHARI (NOW FCJ), SULONG MATJERAIE AND MOHTARUDIN BAKI JJCA
27 NOVEMBER 2014

Banking — Banks and banking business — Guarantor — Claim for repayment of loan from guarantors — Whether borrower breached terms and conditions of letter of offer for loan facilities — Whether loan was released and utilised — Whether bank made proper demand from guarantors before initiating action — Whether mere filing of writ and service constituted sufficient demand

The High Court had allowed the respondent's ('the plaintiff') claim against the appellants ('the defendants') in respect of a default of banking facilities ('the facilities'). The plaintiff had provided the facilities to the first defendant and claimed that the first defendant had breached the terms and conditions of the letter of offer for the facilities and defaulted on the repayment of the facilities. Therefore, it was contended that the second and third defendants, who were guarantors, were liable for the repayment. The defendants elected to make a submission of no case to answer. The High Court judge found that the defendants' objection was related to technical matter and was inconsistent with the defence and proceeded to allow the plaintiff's claim. In the present appeal, the defendants contended that the conditions precedent of the letter of offer makes it mandatory to comply with the said conditions precedent before the facilities could be released to the defendants; the plaintiff failed to prove that the first defendant had complied with the conditions precedent in the letter of offer to avail them of the facilities; the facilities were never utilised if it were granted; the requirement of making a demand against the second and third defendants as guarantors is a *sine qua non* before an action could be commenced. On the other hand, the plaintiff's contention was that a demand was made through a notice sent to the defendants respectively and alternatively, the plaintiff's writ and statement of claim by itself was a notice to the defendants.

Held, allowing the appeal and setting aside the order of the High Court:

(1) The burden was on the plaintiff to prove that the facilities were granted without the conditions precedent being fulfilled. However, the plaintiff had failed to do so and had not discharged the burden of proof imposed on them. Since the banking facilities were never utilised by the

defendants for non-compliance of the said condition precedent, the said facilities were never released to the defendants. There was no evidence that the defendants had complied with the conditions precedent contained in the letter of offer (see paras 6, 28, 40 & 51).

(2) The plaintiff did not satisfy the pre-condition of making a demand to the second and third defendants and had also failed to show that such demand was sent to the defendants as there was no proof of posting. It was wrong to hold that no demand was required to create a cause of action and that the mere filing of the writ and the service was a sufficient demand obliging the defendants to pay (see paras 34–35).

[Bahasa Malaysia summary

Mahkamah telah membenarkan tuntutan responden ('plaintif') terhadap perayu-perayu ('defendan-defendan') berkaitan kemudahan perbankan ('kemudahan'). Plaintif memberikan kemudahan kepada defendan pertama dan mendakwa bahawa defendan pertama telah memungkiri terma dan syarat surat tawaran untuk kemudahan dan mengingkari atas bayaran balik kemudahan. Oleh itu, ia adalah dihujahkan bahawa defendan kedua dan ketiga, yang mana adalah penjamin, bertanggungjawab untuk bayaran balik. Defendan-defendan memilih membuat hujahan mengenai tiada kes untuk menjawab. Hakim Mahkamah Tinggi mendapati bahawa bantahan defendan-defendan adalah berkaitan perkara teknikal dan adalah tidak konsisten dengan pembelaan dan meneruskan untuk membenarkan tuntutan plaintif. Dalam rayuan ini, defendan-defendan berhujah bahawa syarat duluan surat tawaran membuatkannya mandatory untuk mematuhi dengan syarat duluan sebelum kemudahan boleh dilepaskan kepada defendan-defendan; plaintif gagal untuk membuktikan bahawa defendan pertama telah mematuhi dengan syarat duluan dalam surat tawaran untuk membolehkan mereka mendapat kemudahan tersebut; kemudahan tidak pernah digunakan jika ia diberikan; keperluan untuk membuat tuntutan terhadap defendan-defendan kedua dan ketiga sebagai penjamin adalah *sine qua non* sebelum tindakan dapat dimulakan. Sebaliknya, hujahan plaintif adalah bahawa tuntutan dibuat melalui notis yang dihantar kepada defendan-defendan masing-masing dan secara alternatif, writ dan penyata tuntutan plaintif dengan sendirinya adalah notis kepada defendan-defendan.

Diputuskan, membenarkan rayuan dan mengetepikan perintah Mahkamah Tinggi:

(1) Beban adalah ke atas plaintif untuk membuktikan bahawa kemudahan diberikan tanpa syarat duluan dipenuhi. Walau bagaimanapun, plaintif telah gagal untuk berbuat sedemikian dan telah tidak melepaskan beban pembuktian yang dikenakan ke atas mereka. Memandangkan kemudahan perbankan tidak pernah digunakan oleh defendan-defendan untuk ketidakpatuhan syarat duluan, kemudahan tersebut tidak pernah

dilepaskan kepada defendan-defendan. Tidak terdapat keterangan bahawa defendan-defendan telah mematuhi dengan syarat duluan yang terdapat di dalam surat tawaran (lihat perenggan 6, 28, 40 & 51).

(2) Plaintif tidak mematuhi prasyarat membuat tuntutan kepada defendan-defendan kedua dan ketiga dan juga gagal untuk menunjukkan bahawa tuntutan sedemikian dihantar kepada defendan-defendan memandangkan tidak terdapat bukti pos. Ia adalah salah untuk memutuskan bahawa tiada tuntutan diperlukan untuk membentuk kausa tindakan dan bahawa pemfailan semata-mata writ dan penyerahan adalah tuntutan yang mencukupi dengan mewajibkan defendan-defendan untuk membayar (lihat perenggan 34–35).]

Cases referred to

Mohd Nor Afandi bin Mohamed Junus v Rahman Shah Alang Ibrahim & Anor [2008] 3 MLJ 81; [2008] 2 CLJ 369, CA (folld)

Legislation referred to

Rules of the High Court 1980 O 34

Appeal from: Suit No D6-22–1225 of 2001 (High Court, Kuala Lumpur)

Jagjit Singh (Jagjit Singh & Co) for the appellant.
Paari Perumal (K Jayaratnam with him) (Jayaratnam & Partners) for the respondent.

Zaleha Zahari JCA:

[1] On 9 January 2012 the unanimous decision of this court was to allow the defendants' appeal and to set aside the decision of the High Court judge dated 30 July 2009. I have read the judgment of my brother, Mohtarudin bin Baki JCA in draft as to why this appeal was allowed. My reasons in allowing this appeal was however different. They are as follows.

[2] In this judgment parties will be referred as they appeared in the court below.

BACKGROUND

[3] It is necessary to set out what transpired in this case in some detail.

[4] The plaintiff (respondent in this appeal) claimed that by letter of offer (ie ID5) dated 21 July 1997 they had offered to the first defendant overdraft (OD), letters of credit (LC), trust receipts (TR), bank acceptances (BA) and bank guarantee (BG) facilities. The plaintiff alleged that the first defendant was

in breach of the terms and conditions set out in the said facilities of which the second and third defendant were guarantors pursuant to letter of guarantee (exh P1).

[5] In its statement of claim the plaintiff alleged that the defendants were indebted to the plaintiff as at 28 February 2001 in the following sums:

Overdraft Facility	RM498,846.27
LC/TR/BA/BG	RM1,543,357.94
Total	RM2,042,204.21

[6] The defendants disputed the claim. The defendants' case was that the said facility was never granted as they were unable to comply with the conditions specified in the letter of offer. Further and in the alternative, even if the facility was granted the defendants claimed that they had never drawdown or utilised the facilities and put the plaintiff to strict proof of their claim.

[7] The record shows that at case management pursuant to by O 34 of the Rules of High Court 1980, as well as when trial commenced on 24 May 2005, the plaintiff's case rests on a single bundle of documents, ie that listed in encl (11).

[8] The first trial judge heard two of the plaintiff's witnesses, ie Rashidah bt Abu Bakar ('SP1') and Lim Siew Hua ('SP2'). PW1's evidence was formal, ie to tender the letter of guarantee executed by the second and third defendant, (exh P1).

[9] On 24 May 2005 SP2 testified, in the absence of the branch manager, she signed on behalf Norhafiz bin Malan the most senior officer in the Credit Department. The letter of offer was also signed by Norhafiz bin Malan on behalf of the bank.

[10] On the continued hearing of 6 February 2006 two other witnesses testified on behalf of the plaintiff, ie Chey Onn Wah ('SP3') and Norhafiz bin Malan ('SP4'). The testimony of these two witnesses is reproduced for ease of reference.

CHEY ONN WAH

[11] Chey Onn Wah (SP3), the branch manager in cross-examination, in response to questions posed whether the defendants had complied with the conditions precedent stipulated in the letter of offer (ID5) testified as follows:

Q: Rujuk kepada letter of offer ms 7 — conditions precedent: (a) Receipt of original copy of our letter of offer duly executed. Adakah encik mempunyai original copy?

A: Tidak ada.

Q: Condition kedua (b) Board resolution. Adakah Encik mempunyai Dokumen ini?

A: Tidak ada.

Q: Condition keempat (d)?

A: Tidak ada.

Q: Condition kelima (e)?

A: Tidak ada.

Q: Condition keenam (f)?

A: Tidak ada.

Q: Condition ketujuh (g)?

A: Tidak ada.

Q: Condition kelapan (h)?

A: Tidak ada.

Q: Condition kesembilan (i)?

A: Tidak ada.

On the occasions when SP3's evidence was in the affirmative the said answer was followed by him saying that he did have that particular document in question.

Q: Rujuk m/s 8 Bhg B. Adakah Bhg B (a) dipatuhi?

A: Saya tidak ada original copy.

Q: Bagi bhg (b)?

A: Saya tidak ada board resolution.

Q: Rujuk m/s 11. Adakah item (d) dipatuhi?

A: Item (d) dipatuhi tapi saya tiada evidence.

Q: Adakah bhg (e) dipatuhi?

A: Item (e) di patuhi tapi saya tiada bukti.

Q: Adakah item (g) di patuhi?

A: Saya tiada dokumen.

Q: Adakah item (h) di patuhi?

A: Saya tiada dokumen bersama saya

Q: Adakah Encik boleh mendapatkan dokumen?

A: Tiada dokumen.

NORHAFIZ BIN MALAN

[12] Norhafiz bin Malan (SP4), the customer relationship officer, was the officer in charge of the defendants' account. In cross-examination when questioned whether the plaintiff would allow the defendants to do a 'drawdown' if the defendants had failed to comply with the prescribed conditions precedent, his answer was as follows:

Q: Adakah Encik setuju ada kemungkinan oleh kerana Defendan gagal mematuhi syarat ini Bank tidak benarkan Defendan drawdown?

A: Setuju.

Q: Adakah Encik setuju akibat tidak mematuhi syarat (tiada drawdown) ini tidak terdapat satu statement of account?

A: Setuju.

Q: Adakah Encik setuju dalam tindakan ini Bank tidak hantar surat?

A: Jika tidak ada drawdown maka tiada surat akan di hantar.

Q: Dalam kes ini, adakah surat di hantar? Adakah apa- apa surat di dalam bundle?

A: Tiada surat yang di hantar di dalam bundle.

Q: Jadi Encik setuju dalam tindakan ini memang tiada apa- apa drawdown bagi kemudahan?

A: Berdasarkan dokumen di Encl. ii tidak ada apa-apa drawdown di buat.

[13] What transpired on the next continued hearing date 5 July 2006 was this. There was a change of the plaintiff's counsel. On this date the plaintiff was no longer represented by En Rosli but by two counsels, En Paari Perumal and En Jayaratnam. The plaintiff's new counsel applied for an adjournment on the ground that they had just been retained. The defendant's counsel objected to the adjournment on the ground that his witness, who was from Sabah, was present in court on that date. The defendant's counsel also informed the court that the defendants was strongly objecting to the fresh documents listed in encl (11) which the plaintiff was attempting to introduce which had just been filed and served on him.

[14] The court allowed the adjournment sought by the paintiff's counsel. The case was adjourned to 6 July 2006 for continued hearing.

[15] The record shows that on the continued hearing date of 6 July 2006 the hearing again did not proceed on the same ground as the previous hearing date, ie because the plaintiff had retained a new counsel to handle the plaintiff's case.

[16] There was then a lapse of almost eight months. On the continued hearing date of 5 March 2007, SP1 was recalled to mark the guarantee as exh P1. The attempt to have the letter of offer to the first defendant (ID5) marked as an exhibit through SP1 was not allowed by the court as SP1 was not its maker.

[17] The record shows one year and nine months lapsed before the case was called again. The next continued hearing date was 9 August 2008. On this date the defendants' counsel informed the court that the plaintiff had, two days prior to that date (ie on 7 August 2007) served upon him yet another bundle of documents ie encl (22) (second supplementary bundle). The defendants were objecting to them and that they also required time to seek client's instructions and, if need be, for the plaintiff's witnesses to be recalled.

[18] The court ruled that it was open to the defendant to raise their objections to the documents listed in the supplementary bundles which had recently been filed on the next hearing date. The case was then fixed the case for continued hearing for two days on 14 May 2008 and 15 May 2008.

[19] On 9 May 2008 the plaintiff's counsel filed two further supplementary bundle of documents ie that listed in encls (22) and (23).

[20] The record shows that on 14 May 2008, the case again did not proceed for continued hearing by reason of the two further supplementary bundle of documents filed on 9 May 2008 which had just been served on the defendants' counsel. In this situation it was not surprising for the defendants' counsel to request for time to obtain his client's instructions in respect the documents listed in the two further supplementary bundle of documents served on them. The case was then fixed for mention on 19 September 2008.

[21] The case was called before a different High Court judge (second trial judge) on 18 September 2008. What transpired on 18 September 2008 before the second trial judge was significant and is reproduced in full:

> En. Paari Perumal bersama K Jayaratnam bagi pihak plaintiff
>
> En. Harjinder Singh bagi pihak defendan-defendan
>
> Semua ikatan dokumen telah difailkan
>
> Terdapat 2 isu:
>
> 1 To recall SP1 to tender document.

2 Terdapat dokumen baru selepas case management yang mana defendan membantah kerana adalah akan stand pending defence

Mahkamah: 13–16.06 09 (SB)

19.03.09 (Submission)

Skeletal submission on the documents

[22] On the hearing date of 19 March 2009 for the hearing of submissions on the plaintiff's two supplementary bundle of documents which was objected to by the defendants' counsel, another High Court judge (second trial judge) presided over the case. The minutes recorded by the second trial judge on this date was as follows:

En Paari bagi pihak plaintiff.

En Paari: We were here this morning. No one told us case in the afternoon. We would like to have the objection heard on 13.07.09. The other days will be kept depending on the outcome of the objection. The bundles of documents are the ones that we got late.

Mah. 13.07.09 (Objection on the 2 bundles of documents)

14–16.07 09 (SB)

[23] On 16 July 2009 the case was called up for continued hearing before yet another High Court judge (third trial judge) whose decision was the subject matter of this appeal before us. The minutes recorded before the third trial judge on 16 July 2009 was this:

Mr. Paari and Mr. K Jayaratnam for the plaintiffs

Mr Harjinder Singh for the Defendant.

Part heard matter

Pleadings — Enclosure 5

Ikatan Bundle yang tidak dipersetujui — Encl 11,19,22, 24

Plaintiff is not relying on enc 23

Part heard — 4 witnesses have given evidence recalling PW4 to mark ID 5 in encl 11.

SD/s says encl 19, 22, 23, and 24 were all filed after 4 witnesses were called and gave evidence and cross examination was completed. In consequence the Defendants says that it must be expunged from court records or/in the alternative if the plaintiff wants to proceed on these documents then it must be settled by submissions.

P/s: The documents were tendered late because there mergers with the new bank. Documents were given only later and we have produced in court. They are not going to be prejudice Court can still admit as exhibit but give low probation value (sic)

[24] The plaintiff's counsel then called five other witnesses ie Azman bin Bahrin ('PW5'), Lee Huan Nee ('PW6'), Johari Ariffin b Osman ('PW7'), Yeap Eng Lock ('PW8') and Jayaratnam a/l Kumarasamy ('PW9') who was examined, subjected to cross examination and re-examination by the defendant's counsel. In the examination of these additional witnesses reference was made to the documents listed in supplementary bundle of documents in encls (11), (19) and (22). The plaintiff then closed their case.

[25] The defendants counsel then elected to submit that that there was no case for the defendants to answer.

[26] The judge ruled in favour of the plaintiff. Hence this appeal.

THE HIGH COURT DECISION

[27] The learned trial judge entered judgment in favour of the plaintiff. His reasons are set out in one solitary paragraph ie para 5 of the judgment which states as follows:

> 5. I have read the evidence, read the documents, exhibits and submission of the parties in detail. The parties have dealt with the issues in detail. It will serve no useful purpose in repeating the same. I take the view that the plaintiff's claim must be allowed. My reasons inter alia are as follows:
>
> (a) The plaintiff have established what was alleged in the statement of claim by oral; evidence as well as supporting documents sufficient for the defendants to be present in court and rebut the plaintiff's evidence in law.
>
> (b) As the Defendants' contrary to what was alleged in the defence did not given (sic) any evidence what was stated by the plaintiff's stand unrebutted. (see *Aik Ming (M) Sdn Bhd & 8 Ors v Chan Ching Chuen & 3 Ors & Another Case* [1995] 3 CLJ 639; and *Recalvia Design Steel (M) Sdn Bhd v Vista Access Sdn Bhd & Anor* [2008] MLJ 2008 1 LNS 88). And it also in my view attracts the jurisprudence relating to adverse presumption.
>
> (c) I have no reason to disbelieve the plaintiff's witness. It is my finding that the plaintiff has established its case.
>
> (d) Submission of no case to answer in banking matters may be fatal when there are oral and supporting evidence to show nexus to the claim. The defendants have been cautioned of the consequence of no case to answer and I have set out the jurisprudence and the relevant cases relating to no case to answer in *Thor Eagle Maritime Agencies v Innovest Berhad* [2009] 1 LNS 490. I do not wish to repeat the same.

It is against this decision that the defendants now appeals.

THE APPELLANT COUNSEL'S SUBMISSIONS

[28] The appellant's counsel submitted that the plaintiff had not discharged the burden of proof which lies upon them. The learned High Court judge took a simplistic view. The learned judge failed to consider fundamental issues and facts when he ruled in favour of the plaintiff.

[29] The plaintiff had called four of their witnesses and the defendants had completed cross-examination of these witnesses. The defendants had tailored their cross-examination on the documents held out in the only bundle then before the court, ie encl (11).

[30] The filing by the plaintiff of four supplementary bundle of documents mid-way through trial after four of the plaintiff's witness had completed giving their evidence and subjected to cross-examination based on encl (11) had been strongly objected to by the defendants' counsel. Likewise, the supplementary bundle (encl (19)) filed on the 7 August 2007 (ie two days before the continued hearing of 9 August 2007 and 10 August 2007) had also been objected by the defendants' counsel. On the 9 May 2008 (ie five days before the continued hearing of 14 May 2008 and 15 May 2008) the plaintiff filed two further supplementary bundle of documents ie that listed in encls (22) and (23).

[31] On 9 July 2009 (ie four days before the continued hearing dates of 13–16 July 2009) the plaintiff filed another supplementary bundle of documents (ie encl (24)).

[32] The appellants' counsel submitted that to allow the plaintiff to introduce voluminous documents in the form of encls (19), (22), (23) and (24) and to introduce new witnesses at such a late stage of trial was prejudicial to the defendants as the plaintiff was attempting to paint a different picture when they recognised that their avernments was not supported by their evidence. To allow the plaintiffs to adduce fresh evidence in the form of encls (19), (22), (23) and (24) and to introduce new witnesses falls nothing short but of a 'trial by ambush'.

[33] The court should not allow the documents listed in the supplementary bundle of documents to be part of the record because the said documents were at all material times available to the plaintiffs. This is evident from the testimony of Azman bin Baharin (SP5), Lee Huan Nee (SP6), Johari Ariff bin Osman (SP7) and Yeap Eng Lock (SP8). All of the documents in encls (19), (22), (23) and (24) were available way back in 2003, when the case came up for case management. The plaintiff's lackadaisical attitude prevented them from obtaining the documents at the earliest possible stage. Johari Ariff bin Osman (SP7) in cross-examination had testified that the request for the documents was

only received by him from Yeap Eng Lock (SP8) in the month of July 2007. The plaintiff was clearly was not diligent.

[34] The letter of offer, though accepted, does not automatically confer upon the defendants the right to be entitled to the said facilities. The enjoyment of said facilities were only available for the defendants' benefit if the defendants strictly comply with all of the conditions precedent. The uncontroverted and unchallenged evidence of SP3 and SP4 elicited during cross-examination was that the defendants had not complied with these conditions precedent. Further, even if the facilities were granted, the same was never utilised by the defendants as there is no evidence, documentary or otherwise, of any proof of drawdown.

[35] In an action for recovery, a demand must be made to the guarantors before an action can be initiated against the guarantors, (the second and third defendants). The requirement of making a demand against the guarantors is a *sine qua non* before an action can be commenced against the guarantors.

[36] The defendants urged this court to allow the appeal with costs.

THE RESPONDENTS' COUNSEL'S SUBMISSION

[37] By reason of the defendant electing to make a submission of no case to answer, all of the evidence led by the appellants are assumed to be true. The case of *Mohd Nor Afandi bin Mohamed Junus v Rahman Shah Alang Ibrahim & Anor* [2008] 3 MLJ 81; [2008] 2 CLJ 369 was relied as authority for this proposition.

[38] On the documents not having been marked as exhibits and not admitted as evidence at trial, the respondent counsel submitted that by reason of the documents having been produced through the relevant witnesses at trial and not ruled as inadmissible, it was in order for the trial judge to rely on them.

[39] Notice of demand to the defendants had been admitted in para 11 of the defence. A notice dated 12 March 2001 had been sent to the defendants. PW9, an advocate and solicitor, had testified that notices of demand were issued to the defendants on behalf of the plaintiff. The plaintiff's writ and statement of claim itself was a notice to the appellants.

[40] The fact of disbursement of funds through overdraft and trust receipts were established through witnesses PW5, PW6, PW7 and PW8. On the conditions precedent not having been proved, and whether there was disbursements of funds for the appellants utilisation, the court's attention was also drawn to the letter of offer (ID5) sub-cl (j) which states 'The Bank reserves

the right to add to, delete, alter, amend and vary any terms and conditions in its absolute discretion at any time it deems fit.' The conditions precedent were for the benefit of the plaintiff and the plaintiff was entitled to waive them, if it so wished, before the disbursements of the funds.

[41] The court was urged to dismiss the appeal with costs.

DECISION

[42] I have considered the submissions in this appeal with some concern as they appear to show an inadequate grasp of matters which may be somewhat elementary.

[43] The introduction of O 34 to the Rules of the High Court 1980 ('the Rules'), the Rules then in force, marks a change from the traditional position under which the progress of a case was largely left in the hands of the parties. Pursuant to O 34, the court, not the parties, now dictate the progress of cases at the pre-trial stage to ensure that the practices and procedures applicable during the respective stages prescribed by the Rules are complied with.

[44] The duty of an advocate and solicitor is to assist the court by presenting documentary evidence in the most convenient manner. In preparing for trial it was incumbent upon parties to prepare agreed and non-agreed bundles of documents. Bundles are made for the convenience of court and parties to facilitate a speedy trial. Documents crucial to the plaintiff's claim should be held out. If agreed, to set them out in a proper bundle and paged in order of date. If not agreed, then copies should be made available, bound and paged in another bundle.

[45] Whilst I agree that strict and slavish adherence to forms and rules can sometimes hinder the administration of justice, one however must also bear in mind that these forms and rules should not be disregarded for no reason whatsoever since they embody the experience of the courts over the years in the course of speedy and efficient administration of justice. Non-compliance precluded a party in breach from tendering the documents except by leave of court.

[46] The manner in which the plaintiff's counsel had proceeded to prove their case was certainly in my view extremely unsatisfactory. The filing of not one, but four supplementary bundle of documents long after the period to do so had expired, after four of the plaintiff witnesses had given their evidence, had rightly been objected to by the defendants' counsel. The introduction of additional supplementary bundles of documents, encls (11), (19), (22) and (24), on a piecemeal and instalment was certainly grossly unfair to the

defendants as the defendants had not been given an opportunity to inspect them. The documents listed in supplementary bundle of documents in encls (11), (19), (22) and (24) clearly were disputed documents. A

[47] Much time was expended before us in argument on the actual evidence upon which the High Court judgment his decision rests. B

[48] By reason of objection having been taken by the defendants' counsel, the court was in my view obliged to consider the objection raised and to rule thereon. From the record it would appear that the trial judge did not return to the issue of whether to admit/not admit the documents listed in encls (11), (19), (22), and (24). The general rule is that documents not admitted in evidence cannot be relied upon by the trial judge. C

[49] There clearly has been an inordinate and inexplicable delay as to why the documents in the supplementary bundle of documents were not introduced earlier. The documents were always in the possession of the plaintiff but did not find it fit to file the same. The plaintiff's witnesses Azman bin Baharin (PW5), Lee Huan Nee (PW6), Johari Ariff bin Osman (PW7) and Yeap Eng Lock (PW8) testified before the court that all these documents in encls (19), (22), (23) and (24) were available way back in 2003, the year when the case management was held. D E

[50] Counsel for the plaintiff clearly has not been diligent in preparing the plaintiff's case. Diligence means earnest and meticulous pursuit towards the attainment of one's goal. The plaintiff's counsel has, in my considered opinion, adopted a lackadaisical attitude in the preparation of his case and guilty of indolence. The question of denying the plaintiff the right to produce those documents does not arise. The plaintiff has only itself to blame for the predicament it had found itself in. Justice was not only to the plaintiff but also to the defendants. I am of the view that the objection taken by the defendants' counsel should have been sustained. Not having obtained leave of the court, the plaintiff should not have been allowed to introduce additional witnesses as a matter of course, and for such witnesses to refer to the documents listed in the supplementary bundles filed at mid-way through trial also as a matter of course. F G H

[51] I am compelled to conclude that the learned judge had arrived at his decision on evidence the veracity of which remains suspended. The evidence led by additional witnesses by reference to the documents listed in the supplementary bundle of documents must be expunged from the court record. They should not have been taken into consideration. Shorn of these evidence there was no evidence that the defendants had complied with the conditions precedents imposed by the plaintiff, the consequence of the facility either not utilised or the same was withdrawn by the plaintiff. I

[52] There are two sets of circumstances under which a defendant may submit that he has no case to answer. There may be such a submission, firstly in a situation where, accepting the plaintiff's evidence at its face value, no case has been established in law; and in the other, the evidence led by the plaintiff was so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged.

[53] I am of the view the evidence led by the plaintiff in this case was unsatisfactory. The trial judge should have made a finding that the burden of proof has not been discharged by the plaintiff and that there was no case for the defendants to answer.

[54] The learned trial judge accordingly erred in entering judgment for the plaintiff.

[55] For these reasons the appeal was allowed with costs and the decision of the High Court judge set aside.

Appeal allowed and order of the High Court set aside.

Reported by Afiq Mohamad Noor